Supreme Court

OF THE

United States.

No. 301.

E. S. C. ROBERTSON, *Plaintiff in Error,*

vs.

HENRY CEASE. Deft in Error

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here on a writ of error from the Circuit Court of the United States for the Western District of Texas.

The defendant in error, Henry Cease, brought suit against the plaintiff in error on the 25th of September, 1873, to recover the principal and interest due on a promissory note, made by the plaintiff in error, for $4,190, dated Belton, October 2, 1860, payable July 1, 1861, to the order of Dr. W. J. Chamblin, at the office of Chamberlin & Earle, Belton, Texas, with ten per cent. interest from date and current rate of exchange on New York.

The petition sets forth that W. J. Chamblin died intestate in the state of Illinois April 29, 1861, and that letters of administration were granted on his estate by the county court of Mason county, in that state to Tabitha C. Chamblin and J. M. Winn, and that on September 10, 1873, the administrators, for value received, assigned this note to the defendant in error.

The first paragraph of the petition describes the plaintiff in error as "Henry Cease, *who resides* in the county of Mason and State of Illinois," and describes the plaintiff in error as E. Sterling C. Robertson, *who resides* in the county of Bell and state of Texas." (Transcript, p. 2.)

There is no averment of the citizenship of either the plaintiff or the defendant in the original petition, and though the defendant in error sues as the assignee of the administrators, there is no averment of their citizenship. Nor is any fact stated, showing that the administrators could themselves have

maintained this suit had they not assigned their cause of action to the defendant in error.

The plaintiff in error filed his pleadings on January 24, 1874, as follows: 1st. A sworn plea to the jurisdiction, alleging that the transfer of the note was merely colorable, and intended as a fraud on the jurisdiction of the court. 2d. A general demurrer. 3d The general issue and *non assumpsit.* 4th. A special plea in bar, alleging failure of consideration, fraud and misrepresentation on the part of the defendant in error. 5th. The statute of limitations. (Transcript, pp. 4 to 6.)

On January 13, 1875, the defendant in error filed, with leave of the court, an amended petition, which is in substance merely a replication to the defendant's answer. (Transcript, p. 10.)

On March 1, 1875, (transcript, p. 69), the trial commenced, and the general demurrer of the plaintiff in error being overruled, (transcript, p. 69), a jury was empanelled and the court proceeded to hear evidence. Upon the note in suit being offered in evidence, its admissibility was objected to and discussed. The question of jurisdiction was also argued, as appears from the minutes of the court. (Transcript, p. 69.)

The court held these questions under advisement during the whole of the second of March, as appears from the record, (transcript, p. 69), and on the third day of the trial overruled the objections.

At this late stage of the cause the defendant in error, apparently without leave or authority from the court, filed another amended petition on March 3. 1875, (transcript, p. 11), as follsws:

"That the said W. J. Chamblin, at the date of his "death, was a resident citizen of the county of Ma- "son, in the state of Illinois; that each and all of "his heirs were, at the date of his death, resident cit- "izens of the state of Illinois, and that they have "ever since been resident citizens of said state: "that the said T. C. Chamblin and J. M. Winn, ad- "ministrators of said estate, were, at the date of the "date of the sale, transfer and delivery of the note "sued on by petitioner, resident citizens of the "county of Mason in the State of Illinois, have "ever since been, and still are, resident citizens of "said state; that the defendant, E. S. C. Robertson. "was, at the date of the institution of this suit, and "still is, a resident citizen of Bell county, in the "Western District of Texas and state of Texas."

"Wherefore, etc."

It thus appears that though the general demurrer had been presented to, and overruled by, the court. and the question of jurisdiction again raised on the introduction of the note, the defendant in error never attempted to cure this defect in his original petition until the third day of the trial. It will also be perceived that in this amended petition the citizenship of the administrators, and of the plaintiff in error, is for

the first time disclosed; *but the citizenship of the defendant in error, Henry Cease, still remains undisclosed,* and does not appear anywhere in the record.

The plaintiff in error moved to strike out this amended petition, owing to the unusual manner and time of filing it, on the same day that it was filed: (transcript, p. 12), but the record does not disclose what action was had on the motion.

At the same time the plaintiff in error, with the leave of the court, filed a general demurrer to this amended petition, (transcript, p. 12), and also filed a special demurrer, directly raising the questions of jurisdiction and limitation, and again pleaded in bar limitation to the amended petition.

The trial proceeded during the fourth of March: on the fifth the case was submitted to the jury, (transcript, p. 69); and on the sixth the jury returned a verdict against the plaintiff in error for $5,200, upon which judgment final in favor of the defendant in error was entered. (Transcript, p 70.)

The plaintiff in error thereupon filed a motion in arrest of judgment, setting up especially the want of jurisdiction in the court to try this cause. (Transcript, p. 70.) This motion was overruled. (Transcript, p. 71.)

Three bill of exceptions were saved by the plaintiff in error during the progress of the cause.

The first bill raises the question of admissibility in evidence of the note sued on. (Transcript, p. 72.)

The second brings in question the action of the court in refusing certain instructions on the subject of limitation asked by plaintiff in error. (Transcript, p. 72.)

The third is an exception to the charge of the court on the subject of limitation. (Transcript, p. 73.)

The charge is on page 66 of the transcript.

A writ of error was applied for and obtained March 8, 1875.

The clerk certifies that the transcript contains a full and true copy of *all* the proceedings had in the cause. (Transcript, p. 77.)

The transcript is unnecessarily voluminous; all that portion from page 13 to page 66 is wholly irrelevant, and we deem it due to ourselves to state that this matter was inserted without our knowledge or consent. The only portions the court need look to in determining this cause will be found in the first thirteen pages and those subsequent to page 66.

The questions before this court are:

I. The correctness of the action of the court in overruling the motion in arrest of judgment, filed by plaintiff in error, involving the question of jurisdiction.

II. The action of the court permitting the note in suit to be read to the jury.

III. The correctness of the views entertained by the court below in its charge on the question of limitation as applied to the case at bar.

ASSIGNMENT OF ERRORS.

The errors assigned are:

I.

The overruling the demurrer and motion in arrest of judgment of the plaintiff in error.

II.

The action of the court on the question of limitation.

These errors will be briefly considered in their order and such portions of the record as it may be necessary for the court to examine will be set out or referred to,

I.

JURISDICTION.

The court below had no jurisdiction to render judgment in this case.

The pleadings fail to aver the *citizenship* of the defendant in error. The only description of him to be found in the record is as follows:

"The petition of Henry Cease, who *resides* in the "county of Mason and state of Illinois." (Transcript, p 2.)

There is nothing in this sentence to negative the idea that the defendant in error is a citizen of Texas only temporarily residing in Illinois.

It has been held by this court ever since its organization that a mere averment of the *residence* of a party is not sufficient.

The fact of citizenship must be made to appear affirmatively in the record in some satisfactory manner.

In *Shelton v. Tiffin*, 6 Howard, 184, it is said:

"In the declaration or bill an allegation of *citi-*
"*zenship* of the parties must be made, as it has
"been held that an averment of *residence* is insuf-
"ficient."

In *Parker v. Overman*, 18 Howard, 141, this court say:

"*Citizenship and residence are not synonymous*
"*terms.*"

The following cases are to the same effect:

Hornthol v. The Collector, 9 Wall, 565.
Bingham v. Cabot, 3 Dallas, 382.
Abercrombie v. Dupuis, 1 Cranch, 343.
Sullivan v. Fulton Steamboat Co., 6 Wheaton, 450.
Breedlove v. Nicolet, 7 Peters, 429.
See also Conkling's Treatise, (4th ed.), 345.

This error will necessitate the reversal of the judgment; and as the question of limitation will nec-

essarily have to be met and will, we believe, ultimately dispose of the case, we will now briefly call attention to it.

II.

LIMITATION.

If this case is remanded because of the want of a proper jurisdictional averment of the citizenship of the defendant in error, the question of the statute of limitations as a defense will at once be presented, and that plea is in fact now interposed.

It will be conceded that when this averment is made, (if it can be truthfully made), then for the first time will the defendant in error be in a condition to maintain his suit and obtain a judgment.

If this be so, then the statute of limitations will run against him from the accrual of his cause of action until the time of the filing of such allegation as will enable him to maintain his suit.

No court, at this late stage, would allow such an amendment to be filed, (if at all), without the payment of all costs up to the date of its filing, and without, from that time forward, treating the amendment as the commencement of a new suit.

The note on which this suit is brought matured July 1, 1861, and, admitting for the purposes of this

argument, and for that purpose alone, that by the laws of Texas the statutes of limitation were suspended in Texas from January 29, 1861 until March 30, 1870, (Art. XII, Section 43, Constitution of Texas of 1869; 2 Paschal's Digest, p. 1132), still as this amendment has not yet been made, the note is already barred. For, by the statutes of limitation of Texas, (Act of February 5, 1841, sec. 1; Paschal's Digest, Art. 4609, p. 758), suits on promissory notes and other contracts in writing "must be commenced and sued within four years next after the cause of action accrued and not after."

In *Littlefield v. Fry*, 39 Texas, p. 279, a case like the present, the Supreme court of Texas recognized that the statute of Texas, (Act of May 13, 1846; Pas. Dig. Art. 1427), requires the petition to state clearly the names of the parties and their *residence*. These averments, in the courts of Texas, are as necessary to give jurisdiction to the state courts as the averment of citizenship in the federal tribunals. In the case last cited, and in which there was no averment of the residence of the parties, it was held that an amendment setting up the fact of residence was in the nature of a new suit and did not relate back to the filing of the original petition. On this point, and in this connection, the Supreme court of Texas lay down the rule as follows:

"The court may certainly permit an amendment "on payment of all costs where the original peti-

"tion sets out no cause of action, or where *it fails "to show jurisdiction*, but such amendment is in "the nature of a *new suit* and *in no case* will such "an amendment be allowed to relate back to the "time of filing of the original suit."

See also: *Williams v. Randon*, 10 Texas, 74.
Henderson v. Kissam, 8 Texas, 46.
Erskine v. Wilson, 20 Texas, 80.
Miller v. McIntire, 6 Peters, 62.
Sicard v. Davis, 6 Peters, 124.
Whitehead v. Herron, 15 Texas, 128.

Judge Story says, in his work on Equity Pleadings, (Sec. 904):

"In most of these cases, the indulgence, given by "the court, is allowed to the mistakes of the par- "ties, and with a view to save expense. But when "an injury may arise to others, the indulgence has "been more rarely granted; and so far as the pen- "dency of a suit can affect either the parties to it, or "strangers, the matter brought into a bill by "amendment will not have relation to the time of "filing the original bill; but the suit will so far be "considered as pending only from the time of the "amendment."

In *Haddock v. Crocheron*, 32 Texas 277, a case in point, the Supreme court of Texas uses the following language:

"The statute of limitations having commenced to "run upon the original cause of action, was not ar- "rested *until the filing of the amended petition.*"

In *McLane v. Belvin*, 47 Texas, 502, the same court say :

"If the amended petition had been filed before "limitation had run, it would have been necessary "to consider the defenses set up. But as such "was not the case, it is altogether unnecessary to do "so, for, manifestly, whether we regard the amended "petition as brought upon the note alleged to have "been delivered up to Mitchell through duress or for "the recovery of damages, it was barred before the "amendment was filed."

In *Holmes v. Trout*, 7 Peters, 214, this court, in discussing the plea of limitation set up to the amend ed bill filed in that cause say, *inter alia:*

"It therefore follows that the title set up in the "amended bill under the decree against the heirs of "Breckenridge is a *new right* and must be consid- "ered as having been first asserted by the amended "bill; and as this bill was filed in May, 1829, the "statute of limitations will constitute a good bar so "far as the right under the decree is asserted."

If this view be correct, the case should be dismissed.

Cutter v. Rae, 7 Howard, 729.

The want of jurisdiction in the court was called to the attention of the defendant in error by the general demurrer, filed as early as January 24, 1874. (Trans. p. 6.) Again, on March 1, 1875, the record shows that the "question of jurisdiction" was discussed, and on March 3, 1875, after the trial had begun, (transcript, p. 69), and after the question of jurisdiction was fully discussed and the manifest defects of the petition in that regard specifically pointed out, he again failed to cure the defect.

Under these circumstances, he must be supposed to stand by his pleadings as they are. He must be presumed to be content with the case as he has made it after his successive amendments.

In a similar case, (*Birmingham v Griffin*, 42 Texas, 139), and under the same practice in Texas, where the party failed to cure the defects in his pleadings after they had been pointed out, the Supreme court of Texas dismissed the case, saying: "But if "the plaintiffs, through design or neglect, fail to "make the necessary amendment, the court has no "alternative but to give the proper judgment, which "is to dismiss the petition."

By the 20th section of the judiciary act, it is expressly pointed out, with a view to the speedy termination of litigation, "that when a judgment or decree shall be reversed in the circuit court, such court shall proceed to render such judgment or pass such decree